Supreme Court, U. S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1974

NO. 74-1417

THOMAS P. LALLY, PETITIONER,

V.

STATE OF CONNECTICUT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT

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STATE OF CONNECTICUT, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

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Petitioner, Thomas P. Lally, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered on February 11, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at Vol. XXXVI C.L.J. No. 33 at Page 1 (February 11, 1975), a copy of which is attached to this petition as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was entered on February 11, 1975, affirming petitioner's conviction dated May 23, 1972. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting here deprivation of a right secured by the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment of the Constitution of the United States.

QUESTION PRESENTED

Witness William F. Best made an in-court identification of Petitioner. At a pre-trial identification the Witness was shown approximately five or six photographs by Detective Joseph Hammick. Witness Best identified a photograph of the Petitioner as the man who had been in his taxi the night of the homicide. Prior to said night, Witness Best had no knowledge of ever having seen or known of the Petitioner. From the time of the taxi ride to the time of the pre-trial identification, Petitioner had not come to know the name or identity of the Petitioner. Detective Hammick did not keep any record of the photographs which were shown. During the pre-trial identification Petitioner was a suspect and in the custody of the Police.

The threshold question is:

Does the Sixth Amendment right to the assistance of counsel require that photographs used in a pre-trial identification be preserved and made available for cross-examination during the trial.

STATEMENT OF THE CASE

During the evening of January 26, 1970, Ross Thomas was in his apartment located on the second floor of the premises known as 442 Farmington Avenue, Hartford. Joseph M. Tobin, Jr. was with him. On about January 27, 1970 a person named John Gill came to the apartment. Mr. Tobin stayed in the same room with Mr. Thomas and Mr. Gill for about fifteen minutes. Mr. Tobin then left the apartment.

About 3:30 A.M. on January 27th, George A. Kendall, Jr. was employed at a gas station

located on the corner of Park Street and Sisson Avenue in Hartford when a man walked into the station. After a conversation, the man went to the men's room. A short time later a yellow cab pulled into the gas station. The man came out of the men's room and got into said cab.

About 4:30 A.M. on January 27th, William F. Best was operating a Yellow Cab. He received a dispatch to pick up a fare at the corner of Park Street and Sisson Avenue. Mr. Best pulled his cab into the gas station. A man came out of the men's room and entered said cab sitting on the passenger's side of the front seat. Mr. Best drove the cab to Lou's Quartet Restaurant on Farmington Avenue in Hartford. The man got out of the cab there and paid his fare. Mr. Best had no prior knowledge of the identity of the man nor had he ever seen the man before.

About 5:40 A.M. on January 27th, Hartford Police officer Walker S. Parker entered Lou's Quartet Restaurant. He sat down and he saw a man he recognized. The man was in the restaurant for three or four minutes and then left. Officer Parker spoke to another man in the restaurant and then called the Hartford police station. Officer Parker recognized the man as Thomas Lally.

Officer Parker left the restaurant and went to 442 Farmington Avenue. He met another police officer there and they went to the second floor Thomas apartment. There they found the dead body of Ross Thomas. Officer Parker notified the police dispatcher and detectives arrived about four minutes later.

About 6:00 A.M. on January 27th, Irving S. Caplan was driving a Yellow Cab. He picked up a man as his first fare at Lou's Quartet Restaurant and took him to the Statler Hilton Hotel. When the cab arrived there, the man paid his fare and entered the hotel. Mr. Caplan recognized the man as Thomas Lally.

During the morning hours of January 27th,

Hartford police officer Henry M. Johnson was on foot patrol in Bushnell Park when he heard a radio dispatch. He went to the Statler Hilton Hotel and saw a Yellow Cab at the entrance. Officer Johnson entered the hotel and he saw a man standing at the register desk. Mr. Johnson made a frisk of the person of the man and he found a gun which he took into his possession.

Between 6:10 and 6:15 A.M. Hartford police sergeant Arthur Williams went to the Statler Hilton Hotel. He saw Officer Johnson frisk a man and take possession of a gun. Sergeant Williams placed that man under arrest and ordered Officer Johnson to take the man to the police station. Officer Johnson did so.

Sometime during the morning of January 27th, the body of Ross Thomas was taken to Hartford Hospital. An autopsy was performed by Dr. Robert Tennant. Dr. Tennant removed two bullets from the head of Ross Thomas and he gave them to Walter Perkins, the director of the crime laboratory of the City of Hartford who was present at the autopsy.

Mr. Perkins returned to his office. Officer Johnson gave Mr. Perkins the gun which he had taken into his possession at the Statler Hilton Hotel.

During the morning of January 27th, and thereafter, detectives of the Hartford Police Department conducted an investigation at 442 Farmington Avenue. Detective Michael Amaruso found and lifted what appeared to be a latent fingerprint on an ashtray which was in the Thomas apartment.

During the morning and into the afternoon of January 27th, Mr. Tobin, Mr. Kendall, Mr. Best and Mr. Caplan were at the Hartford police station. Thomas Lally was at the police station under arrest.

Detective Ralph Murray showed Mr. Tobin various pictures and Mr. Tobin identified a picture of Thomas Lally as being the man named John Gill whom he had seen in the Thomas apartment. Detective Murray did not keep any record of the phtographs which were shown.

Detective John Rucci showed Mr. Kendall various pictures and Mr. Kendall identified a picture of Thomas Lally as being the man he had seen at the gas station. In all Mr. Kendall was shown six photographs.

Detective Joseph Hammick showed Mr. Best approximately five or six pictures and Mr. Best identified a picture of Thomas Lally as the man who had been in his taxi. Detective Hammick did not keep any record of the photographs which were shown.

Detective Francisco Niro showed Mr. Caplan six pictures and Mr. Caplan identified a picture of Thomas Lally as the man he had picked up at Lou's Quartet Restaurant. Mr. Niro recorded the number of the photos and put the photos in an envelope which was placed in a file.

Detective Amaruso worked in the identification bureau of the Hartford Police Department. He compared the fingerprint found in the apartment with a fingerprint of Thomas Lally. He formed an opinion that Thomas Lally had made the fingerprint found on the ashtray.

Mr. Perkins performed ballistics tests on the two bullets given to him by Dr. Tennant. He fired the gun which had been taken from the man at the Statler Hilton and he recovered the bullet. He compared the bullets given to him by Dr. Tennant with the bullet recovered by him. He formed the opinion that the two bullets given to him by Dr. Tennant had been fired from the gun taken from Thomas Lally by Officer Johnson at the Statler Hilton.

Thomas Lally was presented before a grand jury and a true bill of murder in the first degree was returned against him. He was held without bond. He was committed to Norwich Hospital for a time. From Norwich Hospital he was transferred to Security Treatment Center in Middletown.

While at Norwich Hospital, Dr. Ralph C. Andrews and Dr. Heruesto Soriano, both psychiatrists, had occasion to examine Thomas Lally. They formed the opinions that Thomas Lally on January 27, 1970, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Thomas Lally was tried for and convicted of murder in the second degree.

REASONS FOR GRANTING THE WRIT

Four witnesses made pre-trial photographic identifications of the Petitioner and subsequently testified at the trial. Witness Best was the only witness who had no prior contact with or knowledge of the Petitioner and in whose photographic display the photographs were not preserved for trial. The single issue to resolve therefore is whether Detective Hammick should have preserved the photographs shown to Witness Best at the pre-trial identification of Petitioner Lally in order to afford Petitioner the opportunity to cross-examine on the photographs during the trial of the case where Witness Best made an in-court identification of the Petitioner.

In U.S. v. Wade, 388 U.S. 218 (1967) it was said that the plain wording of the Sixth Amendment guarantee "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence'". It had already been decided in Powell v. State of Alabama, 287 U.S. 45 (1932) and cases following that decision that in order

to assure a meaningful defense counsel might be necessary at times prior to and other than the formal trial.

There can be no doubt that a pre-trial identification can be a critical stage of the prosecution. There can also be no doubt that a courtroom identification could result from a suspect pre-trial identification, which courtroom identification could easily be the basis of a conviction.

In U.S. v. Wade, supra, it was stated that "it appears that there is grave potential for prejudice, intentional or not, in the pre-trial lineup, which may not be capable of reconstruction at trial, and... presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial."

The requirement for counsel decided in U.S. v. Wade, supra, was limited to a pre-trial lineup. There is no similar requirement for counsel in a photographic pre-trial identification. "The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." Simmons v. United States, 390 U.S. 377 (1968). The court permitted the pre-trial photographic identification provided it was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The Court in United States v. Ash, 413 U.S. 300 (1973) specifically ruled that the presence of counsel at a photographic pre-trial identification was not required to satisfy the Sixth Amendment guarantee. Part of the rationale being that the accused is not present at a pre-trial photographic identification (as distinguished from a lineup) and therefore "no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary." This

distinction is meaningless in assessing the relative potentials for impermissible suggestiveness.

The more substantial rationale is that irretrievable prejudice in a photographic pretrial identification "is remote, since any unfairness that does occur can usually be flushed out at trial through cross-examination of the prosecution witnesses." This belief is based on counsel's ability to reconstruct the pre-trial photographic identification at the time of trial. "A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant's photographs may be markedly different from the others displayed, but this unfairness can be demonstrated at trial from an actual comparison of the photographs used or from the witness' description of the display. Similarly, it is possible that the photographs could be arranged in a suggestive manner, or that by comment or gesture the prosecuting authorities might single out the defendant's picture. But these are the kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness - and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display." United States v. Ash, supra.

If the rationale of Ash is to have any applied meaning, the pre-trial photographic identification must be capable of accurate reconstruction. Such a reconstruction can only be achieved if the photographs are preserved for examination at the trial. There can be no accurate reconstruction from the witness alone. A suggestive photographic display can be so subtle

as to preclude the possibility of recollection or comment by the witness at the time of trial.

The requirement that photographs used in a pre-trial identification be preserved for examination at the trial would not impose an undue hardship on police interviews of witnesses. It is a rather simple procedure compared to having counsel present at every photographic display. Certainly it is a rather harmless way to offset the possibility of a most harmful misidentification.

CONCLUSION

Based on the facts hereinabove set forth, and the constitutional issue raised in this petition, Petitioner prays for the issuance of a writ of certiorari to issue from this Court to the Supreme Court of the State of Connecticut.

PETITIONER,

By Nicholas P. Cardwell
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ATTORNEY FOR PETITIONER

Personally appeared the undersigned, who being duly sworn, deposes and says:

1. He is a member of the Bar of the State of Connecticut, of the Bar of the State of Maine, and of the Bar of the United States Supreme Court.

2. On the 8th. day of May, 1975, he deposited three (3) copies of this pleading together with the attached appendix in a United States Post Office mail box with the appropriate first class postage affixed thereto addressed to John D. LaBelle, Esq., State's Attorney for Hartford County, 95 Washington Street, Hartford, Connecticut 06106.

Nicholas P. Cardwell
NICHOLAS P. CARDWELL

Subscribed and sworn
to before me this
8TH. day of May, 1975.

Matthew J. Bruscino
Notary Public
My commissioner expires
date: 4/1/78

APPENDIX

CONNECTICUT LAW JOURNAL

VOL. XXXVI No. 33 February 11, 1975 Page 1

SUPREME COURT

December Term, 1974

STATE OF CONNECTICUT v. THOMAS P. LALLY

Indictment charging the defendant with the crime of murder in the first degree, brought to the Superior Court in Hartford County and tried to the jury before Shea, David M., J.; verdict and judgment of guilty of murder in the second degree and appeal by the defendant. No error.

Nicholas P. Cardwell, for the appellant (defendant).

Arnold M. Schwolsky, assistant state's attorney, with whom, on the brief, was John D. LaBelle, state's attorney, for the appellee (plaintiff).

HOUSE, C.J. The defendant was found guilty by a jury of the crime of murder in the second degree and appealed from the judgment rendered on the verdict. He assigned as error and has briefed three evidential rulings of the court admitting into evidence the in-court identification of the defendant, rulings permitting a witness to qualify as an expert in fingerprint identification and to testify as to his opinion, and a claim that the evidence offered by the state was insufficient to support the verdict.

A brief review of the evidence will serve to place the other claims of error in perspective before we consider them in detail; so, we first consider the defendant's contention that

the state's evidence was not sufficient to support the jury's verdict. Such a claim is tested by the evidence printed in the appendices to the briefs. State v. Saia, Conn. (36 Conn. L.J., No. 19, p.1); State v. Johnson, Conn. (35 Conn. L.J., No. 49, p.1).

On January 26, 1970, Ross Thomas, a clinical psychologist, occupied a two-room apartment which he used as an office-dwelling at 442 Farmington Avenue in Hartford. At about 9:45 p.m. on that date, Joseph N. Tobin, Jr., a director of special services at the Institute of Living in Hartford, visited Thomas. While he was there, Thomas received a telephone call from a person who wished to see him. At about 1:15 a.m., a person, identified in court by Tobin as the defendant, arrived. Tobin remained with the two men in the well-lighted room for about fifteen minutes and then left. The defendant was wearing an outer coat of brownish material which he kept on while he was in the apartment. At about 5:40 a.m., Officer Walter S. Parker of the Hartford police department saw the defendant at the Quartet Restaurant on Farmington Avenue. He had previously seen him at a gasoline station about two blocks west of 442 Farmington Avenue. While at the restaurant, Officer Parker received information about a possible crime and went to the Thomas apartment at 442 Farmington Avenue where he discovered the body of Thomas, who had been twice shot through the head by .32-caliber bullets fired at close range. George A. Kendall, Jr., worked at a gasoline station on Park Street, and, about 3 a.m. on January 27, the defendant came to the station and stayed for about one-half hour before leaving by taxi. Kendall noticed that the defendant's trench coat was spotted with blood. William F. Best was a taxi driver. He answered a call to Kendall's gasoline station on the morning of January 27 and transported the defendant to the Quartet Restaurant on Farmington Avenue. Another taxi driver, Irving S. Caplan, at about 6 a.m., answered a call and transported the defendant from the Quartet Restaurant to the Hilton Hotel in Hartford. At

the hotel, the defendant was stopped at the registration desk by three police officers. There was a spattering of blood on his trench coat. He was searched and a revolver was removed from his pocket. When taken, the revolver contained two spent shells. The defendant was arrested for carrying a pistol without a permit.

The Thomas apartment was inspected by the police and tests were made for latent fingerprints. One was found on an ashtray and was identified by Detective Michael Amaruso as made by the defendant. An autopsy disclosed that the death of Thomas was caused by bullet wounds to the head. The bullets were recovered and turned over to Walter E. Perkins, director of the Hartford crime laboratory, who conducted ballistics tests and testified that in his opinion the bullets recovered from Thomas' body had been fired from the revolver which had been taken from the possession of the defendant at the Hilton Hotel. Several doctors testified as to their findings and opinions with respect to the defendant's mental condition, including Louis Gold, a psychiatrist, who testified that Lally did not lack the capacity to understand the wrongfulness of his behavior or to conform his behavior to the requirements of the law.

This is but a brief summary of the evidence which the jury had for consideration, but it suffices to show that there was no merit to the defendant's motion to set aside the verdict on the ground that it was against the evidence, and that the court committed no error in denying the motion.

The defendant's first several assignments of error are addressed to rulings of the court which permitted witnesses Tobin, Kendall, Best and Caplan to make an in-court identification of the defendant and to describe their respective contacts with him on the night of the homicide. The rulings were all made by the court in a preliminary hearing in the absence of the jury on the defendant's motion to suppress the in-

court identification. The defendant did not brief the assignment of error addressed to Caplan's testimony and identification so it is considered to have been abandoned. State v. Croom, Conn. (35 Conn. L.J., No. 39, pp. 14, 16); State v. Brown, 163 Conn. 52, 55, 301 A.2d 547. While the testimony of each of the other three witnesses related to the particular circumstances of his contact with the defendant, each of them, at the trial, identified the defendant as the person with whom he had contact on the early morning of January 27, 1970, and testified as to the circumstances of that contact and as to the opportunity each had to observe him. In each instance the court concluded from the testimony at the preliminary hearing that each witness' in-court identification of the defendant was based upon his recollection of his contact with the defendant on the early morning in question.

The defendant claims that the court should not have permitted the in-court identification by the three witnesses because each of them had previously identified the defendant to the police from photographs shown to each of them by the police in the absence of the defendant and his counsel. The finding of the court discloses that on the morning of the homicide each of the three witnesses went to the police station and each, separately, was shown several photographs, including one of the defendant, and each witness selected the photograph of the defendant as the man with whom he had had contact earlier in the morning - Tobin at Thomas' apartment, Kendall at the service station, and Best in conveying the defendant by taxi from the station to the restaurant.

It is the contention of the defendant, relying upon and quoting from the decision of the United States Supreme Court in Wade v. United States, 388 U.S. 218, 235, 87 S.Ct. 1926, 18 L. Ed. 2d 1149, that, since he was already under arrest, this pre-trial identification by photograph for the police in the absence of the

defendant and counsel for him violated his constitutional rights and rendered inadmissible the courtroom identification as "the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial" because "the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him."

The defendant lays much stress on the fact that all of the photographs submitted to the identification witnesses by the police were not preserved and were not made available for examination in court. He contends that the photographs used in a pretrial identification procedure must be introduced as part of the state's case in order to satisfy the burden of clear and convincing proof that the in-court identification was not "tainted," and that if the state fails to introduce them, then, as a matter of law, the trial court should rule inadmissible any in-court identification testimony by a witness. Obviously the retention and preservation for examination at trial of the photographs used at a pretrial identification is a highly desirable practice and, depending upon the circumstances, may greatly aid the prosecution in sustaining its burden of proof or, on the other hand, mitigate the dangers of misidentification due to the suggestiveness of the photographs themselves. Although the practice is highly desirable, it cannot be held, as a matter of law, to be a necessary condition precedent to a permissible in-court identification.

The short answer to the defendant's contention lies in the finding of the court as stated in its ruling: "I conclude that each of the witnesses had an independent basis for making the identification apart from anything which occurred at the police station, and I am not aware of anything which occurred at the police station which was in any way unduly suggestive. Therefore, the conclusion of the Court is that each of them had an independent basis to make

the in-court identification, and the objection is overruled in that respect." The court's unattacked finding of fact as to the identification by photograph procedure at the police station fully supports its conclusion. The procedure followed and the ruling of the court were fully in accord with the holdings of this court in State v. Duffen, 160 Conn. 77, 273 A.2d 863, cert. denied, 402 U.S. 914, 91 S. Ct. 1397, 28 L.Ed. 2d 657, and State v. Oliver, 161 Conn. 348, 288 A.2d 81.

In the Oliver case, we observed (p. 358): "We also note the absence at the present time of any definitive ruling from the United States Supreme Court on the question whether the holding of the Wade case is applicable to pretrial identification of a suspect by the use of photographs without the presence of the suspect's counsel." That definitive ruling has now been made in the case of United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619. In the present case, Lally had been arrested but a few hours before for carrying a pistol without a permit. He was in custody but had not as yet been informed against. The photographic identification process was still part of the police investigative procedure. In the Ash case, Ash had already been indicted. It was during the prosecutor's preparation for trial that he used a photographic display to determine whether the witnesses he planned to call would be able to make in-court identifications. It was the post-indictment identification upon which Ash based his claim that he was denied the right to counsel at a "critical stage" of the prosecution. Nevertheless, the Supreme Court did not extend the scope of the Wade decision and concluded (p. 321): "We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required. We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the

offender." In the light of our prior cases and the holding in United States v. Ash, supra, there was clearly no error in the rulings of the court relating to the witnesses' identification of the defendant.

The defendant has also assigned as error the ruling of the court that Michael Amaruso qualified as an expert witness on the subject of fingerprints and could testify to his discovery of a fingerprint at Thomas' apartment which he concluded had been made by the defendant. Before making the ruling, the court heard testimony as to the witness' years of service in the police department, in the identification division, the training he received in the field of fingerprinting from an experienced expert, his course of study conducted by the federal bureau of investigation, his professional membership, and further studies." "The determination of the qualification of an expert is largely a matter for the discretion of the trial court." Coffin v. Laskau, 89 Conn. 325, 329, 94 A. 370; Oborski v. New Haven Gas Co., 151 Conn. 274, 280, 197 A.2d 73. The trial court's decision is not to be disturbed on appeal "unless that discretion has been abused, or the error is clear and involves a misconception of the law." 31 Am. Jur. 2d 531, Expert and Opinion Evidence, §31.' Siladi v. McNamara,...[164 Conn. 510, 513. 325 A.2d 277]." Nash v. Hunt, Conn. (35 Conn. L.J., No. 49, pp. 7, 9). We also find no abuse of discretion in this ruling of the court.

There is no error.

In this opinion the other judges concurred.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 74-1417

THOMAS P. LALLY,

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v.

STATE OF CONNECTICUT,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS P. LALLY,

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v.

STATE OF CONNECTICUT,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Connecticut Supreme Court is attached to Petitioner's Brief as an Appendix. It is published in the Connecticut Law Journal, February 11, 1975, Vol. XXXVI No. 33 page 1.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

Sixth Amendment to the Constitution of the United States, Appendix p. 1a.

QUESTION PRESENTED

Whether, under the Sixth Amendment, when a person is in custody, the investigating agency must preserve a record of all photos shown to potential witnesses during the photographic identification procedure so as to afford counsel for the

accused an opportunity to be potentially more effective on cross-examination.

NOTE

A copy of the Record published for the appeal to the Connecticut Supreme Court is herewith filed by the Respondent, and references to the Record are designated herein by the letter "R". The Record contains the Finding made by the trial court, and references to the Finding are designated herein by the letter "F". References in the Appendix designated by the letter "T" are to the original transcript in the case.

STATEMENT OF THE CASE

On January 26, 1970, Ross Thomas, a clinical psychologist, occupied a two-room apartment which he used as an office-dwelling at 442 Farmington Avenue in the City of Hartford. (App. p. 4a).

At about 9:45 P.M. on January 26, 1970, Joseph M. Tobin, Jr., the Director of Special Service at the Institute of Living in Hartford went to that address to visit Dr. Thomas. (App. p. 4a). While he was there, Dr. Thomas received a telephone call at about 12:45 A.M. January 27, 1970 from a person who wanted to see Dr. Thomas. At about 1:15 A.M. a person, identified in Court by Mr. Tobin to be Thomas Lally, arrived at the apartment introducing himself as John Gill. Mr. Tobin remained in the same room with Dr. Thomas and Thomas Lally for about fifteen minutes after Lally arrived. The room was well-lighted and Mr. Tobin was less than two feet from Lally during this time. (App. p. 5a).

At approximately 5:40 A.M. Officer Walter Parker of the Hartford Police Department saw Thomas Lally at the Quartet Restaurant at 494 Farmington Avenue, Hartford. (App. p. 2a). Officer Parker had seen Thomas Lally previously that morning at about 1:00 A.M. at the Shell Service Station on Farmington

Avenue about two blocks west of No. 442 Farmington Avenue. (App. p. 2a). While at the restaurant, Officer Parker received information about a possible crime. He had a conversation with Daniel McMullen who was not available as a witness. (App. p. 2a). Upon leaving the restaurant, he notified his dispatcher of this information and gave the name and description of the person who may have done it. (App. p. 2a). He named Thomas Lally and described him. Officer Parker then went to No. 442 Farmington Avenue where he found the only unlocked door to be to the second floor apartment of Dr. Ross Thomas. He entered, now in the company of another officer, and discovered the dead body of Dr. Thomas lying face down on a couch in one of the rooms. (App. p. 2a). Dr. Thomas had been shot through the head twice at close range with 32 caliber bullets. (App. p. 6a). Officer Parker notified police headquarters of what he found.

Meanwhile upon leaving the Quartet Restaurant, Thomas Lally had been transported by taxi from the restaurant to the Statler Hilton Hotel near Bushnell Park in Hartford. (App. p. 3a). When discovered there by Officer Henry Johnson, Thomas Lally had a trench coat with blood stains on the front in the area of the chest and a revolver in the right coat pocket. (App. p. 3a). He acknowledged that he did not have a permit to carry the gun. He was placed under arrest by Sgt. Arthur Williams for carrying a pistol without a permit. Officer Johnson took the gun into his possession and turned it over to Lt. Walter Perkins for ballistics analysis. (App. p. 3a). The gun taken from Thomas Lally was identified by Lt. Perkins as the gun from which the bullets were shot which caused the death of Ross Thomas. (App. p. 8a).

The apartment of Dr. Thomas was inspected by the police and tests made for latent fingerprints. Det. Amaruso, fingerprint expert from the Hartford Police Department discovered a latent fingerprint on an ashtray in the apartment which he took into his possession and which, upon closer inspection,

testing and analysis, he concluded was from one of the fingers of Thomas Lally. (App. p. 8a). Dr. Tennant performed an autopsy on the body of Ross Thomas and discovered that death had been caused by gunshot wounds to the head. He recovered the bullets and turned them over to Lt. Perkins. The autopsy was performed at 10 A.M., January 27, 1970 and Dr. Tennant was of the opinion that death had occured within ten hours of the autopsy. (App. p. 7a).

Thomas Lally had been seen by witnesses at or in the vicinity of 442 Farmington Avenue from 1 A.M. to 6 A.M. on January 27, 1970.

The Defendant presented some medical evidence in an effort to establish that he was not sane on January 27, 1970 and other evidence about his drinking problem. The State presented rebuttal testimony by Dr. Louis Gold that Thomas Lally did not lack the capacity to understand the wrongfulness of his behavior or to conform his behavior to the requirements of the law. (App. p. 9a).

The jury found the Defendant Thomas Lally guilty of murder in the Second Degree and he was sentenced to life imprisonment at the Connecticut Correctional Institution at Somers.

In the Preliminary Hearing (in the absence of the Jury) on the Defendant's Motion To Suppress the In-Court Identification, the following facts were developed:

Thomas Lally was taken into police custody at about 6:15 A.M. January 27, 1970 and removed to Police Headquarters. (F. par. 2).

When Mr. Tobin learned of the death of Dr. Thomas on the morning of January 27, 1970, he contacted the police believing that he had information that might be of value.

(F. par. 9, 10). He went to the police department and gave a description of the person he had seen in the apartment of Dr. Thomas earlier that day and picked out the photo of Thomas Lally from a group of photos as being the man. (F. par. 11, 19). After he had given a statement and viewed the photographs and was on his way out of the interrogation room to leave, he saw Thomas Lally in person and he voluntarily called this to the attention of the person he was with. (F. par. 25).

Mr. Kendall who was working at a gas station at 1630 Park Street, Hartford said that he saw Thomas Lally at his station under good lighting conditions for 10-15 minutes at about 3:30 A.M. on January 27, 1970. (F. par. 40, 41, 42). Within twelve hours, he went to the Police Department and gave a statement and identified Thomas Lally from a group of photographs. (F. par. 50, 51).

Mr. Best and Mr. Caplan were taxicab drivers who transported Thomas Lally during the early morning hours of January 27, 1970. Mr. Best picked him up at the gas station on Park Street, and took him to Lou's Quartet Restaurant on Farmington Avenue. (F. par. 65, 68). Mr. Best was with him about 15 minutes. (F. par. 69). Mr. Best went to the Police Department about 8 A.M. and while there was asked whether he could identify anyone from a group of photographs. He picked out the photo of Thomas Lally as the person he had taken to the restaurant. (F. par. 70, 73, 74).

Mr. Caplan picked Thomas Lally up at the restaurant at 6 A.M. and took him to the Statler Hilton. (F. par. 83, 87). He knew him from before, having transported him on another occasion. (F. par. 86). He went to the Police Department, gave a statement to Det. Niro, viewed a group of photographs and picked out the picture of Thomas Lally as the person he had driven to the hotel that morning. (F. par. 88, 90).

ARGUMENT

I.

THE SIXTH AMENDMENT RIGHT TO "ASSISTANCE OF COUNSEL" DOES NOT EXTEND TO PRE-INDICTMENT STAGE OR REQUIRE PRESERVATION OF PHOTOGRAPHS.

The petitioner relies upon the decision in *United States* v. *Wade*, 388 U.S. 218 (1967) for the proposition that he was denied effective assistance of counsel at a critical stage because he did not have counsel at the photographic display and the photos shown to one witness were not preserved.

The facts of this case are clearly distinguishable from *Wade*. The *Wade* case involved a post-indictment line-up and was followed by the decision in *United States* v. *Ash*, 413 U.S. 300 (1973) which involved post-indictment photographic identification. In the instant case, the photographic identfication was pre-indictment. As the Connecticut Supreme Court found "he was in custody but had not as yet been informed against. The photographic identification process was still part of the police investigative procedure." (Petitioner's Appendix p. 6A)

The right to counsel, let alone the right to counsel at a photographic identification display, has not been extended to the investigative stage.

> "Petitioner is foreclosed by the law of this circuit from asserting a right to counsel at the pre-indictment, pre-arrest photographic identification sessions, a conclusion that follows from our decision denying the right to counsel at even later photographic displays. *United States ex rel. Johnson* v. *New York Department of Correctional Services*, 461 F.2d 956 (2d Cir., 1972). We adhere to the position

> of *Bennett*. *United States* v. *Bennett*, 409 F.2d 888, cert. den. 396 U.S. 852."
>
> *Saltys* v. *Adams*, 465 F.2d 1023, 1026 (2d Cir. 1972)

In *Kirby* v. *Illinois*, 406 U.S. 682, 688 the Court said, "A person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."

All of the 'right to counsel' decisions "have involved points of time at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information or arraignment." 406 U.S. at 689.

The Sixth Amendment guarantee of counsel is to assist in defending against the crime charged, not against some other not yet charged.

In *Ash* the Court held that the "Sixth Amendment does not grant an accused the right to have counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender." 413 U.S. 321.

In a concurring opinion, Mr. Justice Stewart stated that a photographic display can be distinguished from a lineup in that "there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial . . . from an actual comparison of the photographs used or from the witness's description of the display." 413 U.S. 324. Justice Stewart commented (as did Justice Brennan in his dissent), that it was possible that photographs could be markedly different and in addition could be arranged in a suggestive manner or by comment or gesture the prosecuting authorities might single out the defendant's picture. "But these are the

kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness — and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display." *United States* v. *Ash,* supra, 413 U.S. 324, 325.

The Court concluded, "We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required." 413 U.S. 324.

The Supreme Court of Connecticut stated, "Obviously the retention and preservation for examination at trial of the photographs used at a pretrial identification is a highly desirable practice and, depending upon the circumstances, may greatly aid the prosecution in sustaining its burden of proof or, on the other hand, mitigate the dangers of misidentification due to the suggestiveness of the photographs themselves. Although the practice is highly desirable, it cannot be held, as a matter of law, to be a necessary condition precedent to a permissible in-court identification." (Petitioner's Appendix p. 5A)

II.

THE IN-COURT IDENTIFICATION BY WITNESS BEST HAD AMPLE INDEPENDENT BASIS.

The question of the admissibility of the testimony of witness Best and a possible in-court identification was determined by the presiding judge in a Preliminary Hearing in the absence of the jury. The circumstances of the meeting between the witness and the petitioner were subject to effective cross-examination by counsel for the petitioner. The selection of the

photos and their display to witness Best were open to cross-examination by counsel although the exact photos used were not identified. The Court found from all the evidence "The group of approximately six photos shown to Mr. Best contained a picture of the accused and also of other persons that would be similar in description to the accused." (F. 72, R. p. 10) The Court concluded from all the evidence presented at the Preliminary Hearing that "The procedures followed in questioning Mr. Best and showing him the photos were not unduly suggestive so as to taint his in-court identification of the accused. Mr. Best had ample independent basis for making the in-court identification apart from anything which occurred at the police station." (F. 117, 118; R. p. 14)

In this respect the trial Court agreed with the holding in *United States* v. *Fitzpatrick,* 437 F.2d 19, 26 where it said "Moreover, the government witnesses reconstructed the identification procedure with sufficient explicitness to afford defense counsel an opportunity to probe on cross-examination for conditions prejudicial to (accused)."

III.

WITNESS BEST WAS NOT AN EYEWITNESS TO THE CRIME.

Finally, it must be pointed out that the witness Best was the cab driver who drove the petitioner from a gas station to a restaurant between 4:30 and 5 a.m. He was not an eyewitness to a crime. His testimony was obviously offered to fill in a continuity of movement by the petitioner that morning. His view of the petitioner was not momentary. They were together for 15 minutes. He described the petitioner to the police three hours later and engaged in the photographic identification complained of while the image of his passenger was still fresh in mind — not three years later as in the *Ash* case. (Appendix p. 6a).

It should also be noted that the interviewing of witnesses at police headquarters started with taxi-cab driver Caplan a short time after he delivered Lally to the hotel. The detective who handled the interview with Mr. Caplan did keep a record of the photos used and actually set them aside. (Appendix p. 9a). The same set was used with subsequent witnesses and the photographic identification procedure is not being challenged as to them. Although the police officer who showed a group of photos to witness Best did not preserve the numbers of the photos, he presented the photo array to Mr. Best shortly after Mr. Caplan had gone through the same procedure at the same headquarters.

CONCLUSION

Under all the circumstances, there was ample independent basis for the in-court identification of the petitioner by the witness Best and the petitioner was not denied the assistance of counsel. The petition ought to be denied.

Respectfully submitted,

STATE OF CONNECTICUT

By: JOHN D. LABELLE
State's Attorney

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APPENDIX

Sixth Amendment to the Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

APPENDIX

WALTER S. PARKER was called as a witness in behalf of the State and testified on direct examination, in part, as follows:

That he was a police officer associated for eighteen years with the Hartford Police Department and that on January 27, 1970 he was working for the police department on a shift from 12:00 p.m. to 8:00 a.m. (T. 23). He said that around 1:00 a.m. on the 27th of January he had seen Thomas Lally at a Shell Station located at 510 Farmington Ave. in Hartford approximately two blocks west of 442 Farmington Ave. (T. 32). He said that later that morning at 5:41 a.m. he went to the Quartet Restaurant located at 494 Farmington Ave. near the Cinerama Theater. He was in that restaurant approximately 1/2 hr. (T. 24). While at the Quartet Restaurant he again saw Thomas Lally (T. 30, 31). While at the Quartet Restaurant, the officer received information that a crime may have been committed and when he left the restaurant he went to his cruiser and notified his dispatcher and gave a description of the party that might have committed the crime. (T. 24). He described the suspect as a tall male, white, about 6 ft., tan long coat, blond hair, thick glasses and his name Thomas Lally (T. 33). Using the information he had obtained, he went to 442 Farmington Ave. which was 1/2 block east of the Quartet Restaurant. At that address he went to an upstairs apartment. (T. 27).

Upon entering the apartment he, and an accompanying officer, found a person lying face down on a bed. (T. 28). Checking the condition of the person, they found that he had bled very heavily from the face and had no pulse and that he was dead. (T. 29). It was further stipulated during Officer Parker's testimony that while he was at the Quartet Restaurant he had a conversation with a Daniel McMullen and that Mr. McMullen was not available as a witness. (T. 36).

HENRY M. JOHNSON called as a witness in behalf of the State testified on direct examination, in part, as follows:

That he was a police officer with the Hartford Police Department and had been employed for 4 yrs. He was on a tour of duty from 12 midnight to 8 a.m. on January 27, 1970 and on a footbeat in Bushnell Park. (T. 50). He received a message over the radio with respect to the Statler Hilton Hotel, the message being that a white male wearing a trench coat, about 6 ft., was believed to be enroute to the Statler Hilton in a Yellow Cab. The officer who was in the west half of Bushnell Park walked across the street to the hotel. (T. 54). He noticed a Yellow Cab parked in front of the hotel and upon terminating his conversation with the driver walked into the hotel. (T. 55 & 56). When he entered the hotel he saw a person standing at the register desk. He asked the person whether he had just gotten out of a Yellow Cab and the person nodded. He then asked the person to step away from the counter. He told the person that he fitted the description of a person believed to have committed a crime. (T. 57).

At that time the officer was joined by two other officers. He directed the person to place his hands on one of the columns in the hotel and told him he was going to frisk him. He did frisk the person and he found a revolver in the person's right coat pocket. (T. 58). He took possession of the revolver placed it in his own pocket and took it to the police department where he placed his initials on the butt and then tagged the revolver and put it in the arsenal. (T. 58). He picked up the revolver and brought it to court having obtained it from Mr. Perkins at the Police Department. When he first examined the revolver at Police Headquarters, he observed that there were two spent shells in the revolver. There was a powderlike residue from the spent shells on the cylinder of the gun. (T. 60). He identified the accused Thomas Lally, as the person from whom he took the gun. (T. 60).

On Cross-Examination he testified in part that he had sole possession of the revolver from the time he took it from Lally at the hotel until he tagged it at the police station. (T. 64).

ARTHUR WILLIAMS was called as a witness in behalf of the State and testified on direct examination, in part, as follows:

That he is a Sgt. with the Hartford Police Department and had been employed by the police department for 17 yrs. That on Jan. 27, 1970 he was working a midnight to 8 a.m. shift. He was in a police cruiser in the early morning of Jan. 27 when he received a dispatch containing a description of a person. The description was of a white male, approx. 6 ft. tall, heavy stature, wearing thick glasses, wearing a tan trench coat. (T. 86, 87). He arrived at the Statler Hilton between 6:10 and 6:15 a.m. on the 27th. He was present in the hotel when Off. Johnson patted the person down and recovered a chrome-plated revolver from the pocket of the tan coat. (T. 89). He asked the person whether he had a permit for the gun and the person answered "no" or just grunted. He observed that the coat of the person had blood on the left lapel and the chest area and he placed the person under arrest for carrying a pistol without a permit. He told him what his constitutional rights were. (T. 80). He identified the person as Thomas Lally, the defendant. (T. 91).

JOSEPH N. TOBIN, JR. was called as a witness in behalf of the State and testified on direct examination, in part, as follows:

That he was 30 yrs. old and was employed by the Inst. of Living as a Dir. of Special Services. That he knew Ross Thomas for about a month prior to January, 1970. (T. 104). On the evening of Jan. 26, 1970 he went to the home of Ross Thomas at 442 Farmington Ave. at about a quarter of 10. (T. 105, 106).

He went there for the purpose of discussing with Ross Thomas, sensitivity training sessions which Ross Thomas was conducting in connection with his profession as a Clinical Psychologist. (T. 106). At quarter of 1 in the morning, Ross Thomas received a telephone call and after receiving the call Tobin was requested to stay and he did stay. (T. 109). About 1:15 a third person entered the premises. Ross Thomas went to the head of the stairs to meet the person and Tobin saw them in the hallway. (T. 110). When the third person arrived, Ross Thomas and Mr. Tobin and the third party went into Rm. no. 1 as shown on State's Exhibit A. Mr. Tobin stayed on the premises for about 15 minutes after the third person arrived. (T. 111).

He described the lighting conditions in the hall as "fairly well lit" and the lighting conditions in Rm. 1 in which they all went as "perfectly fine lighting-wise". (T. 111). During the time that they were in the room, Tobin was less than 2 ft. distant from the third person who had come there. (T. 112). Tobin identified the third person who had entered the premises on that day as Thomas Lally, the defendant. (T. 112). Mr. Tobin left the premises about 1:30 and when he left nobody left with him and Mr. Lally and Ross Thomas were present in the premises at 442 Farmington Ave. (T. 113).

On cross-examination Mr. Tobin testified in part as follows: That he noticed a difference in the appearance of Mr. Lally from the time he saw him in the apartment to the time he saw him in court. That he did not believe that Mr. Lally had a mustache at the time he saw him in the apartment of Ross Thomas. (T. 128). He believed that Mr. Lally's weight was approx. the same as he saw him in court. (T. 128). He also remembered that he was wearing an outer coat of a brownish material and that he kept it on during the entire time he was in the apartment. The significant things about the person that stood out in his recollection were his size and his glasses. (T. 130).

WILLIAM F. BEST was called as a witness in behalf of the State and testified on direct examination, in part, as follows:

That he was 23 yrs. old and on Jan. 27, 1970 was employed by the Yellow Cab Company. (T. 147). On the morning of the 27th of Jan. he was dispatched to Park St. and Sisson Ave. to pick up a fare. He described the fare as being about 6 ft. 1 in., light hair, wearing glasses and a trench coat, his weight possibly around 185. (T. 149). He identified Thomas Lally as the person who he picked up on that morning. (T. 150). Lally directed him to take him to Lou's Quartet which Mr. Best found was located on Farmington Ave. next to the Cinerama Theater. (T. 150). While Lally was in his taxi cab in the front passenger seat, he offered Mr. Best a drink and in the course of the conversation Lally mentioned the fact that he, Lally, was carrying a "pistolero". (T. 151). Mr. Lally was at the time, in his opinion, sober. (T. 153).

ROBERT TENNANT was called as a witness in behalf of the State and testified on direct examination, in part, as follows:

That he was a medical doctor with a specialty in pathology and was a member of the Hartford Hospital Staff. He had been practicing the specialty of pathology since 1934. (T. 4). He testified that on Jan. 27, 1970 he performed an autopsy on Ross Thomas at the Hartford Hospital in the presence of Lt. Walter Perkins of the Hartford Police Department. (T. 5). He stated that the death of Ross Thomas was caused by bullet wounds of his head. (T. 11). He discovered upon examination two entrance wounds in the head caused by 32 caliber bullets and that around the wounds were powder marks. He was able to remove both bullets from where they had been lodged, one of them in the neck and the other in the brain. (T. 9). He turned over both of the bullets to Lt. Perkins. (T. 11).

On cross-examination, Dr. Tennant testified, in part, as follows: He examined the entire body very carefully for evidence of trauma and he found none. (T. 20).

He stated that both the bullets played a role in causing death. The bullet wound through the eye and the sinuses did not hit any vital structure within the brain itself but that the bullet through the head went through vital structures at the base of the brain and made it impossible for life to continue and that death occured rapidly after the second bullet entered the head. (T. 32, 33).

On re-direct examination Dr. Tennant testified, in part, that the outer tatoo and powder marks at the site of the bullet wounds was a classical type of reaction to a very close bullet wound. The doctor testified that he did the autopsy at 10:00 a.m. on the 27th (T. 27), and that the estimated time of death was probably within a 10 hr. period of his autopsy. (T. 35).

MICHAEL AMARUSO was called as a witness in behalf of the State and testified on direct examination, in part, as follows:

That he was a detective with the Hartford Police Department assigned to Identification division and had been a Policeman for over 20 yrs. On Jan. 27, 1970 he went to the premises of 442 Farmington Ave. for the purpose of checking the premises for latent prints. (T. 122). He was able to pick up a latent print on an ashtray which was quite readable and he took the ashtray back to the police station with him. (T. 125). He made a comparison of the print on the ashtray with an inked print of the accused by using a magnifying glass. (T. 129). He then took photographs of the latent print and of the inked print of the accused Thomas Lally doing all of the developing and printing of the negatives. He produced an enlargement of each of the fingerprints. (T. 130-135). He testified that a positive identification of fingerprints can be made if there are 12 characteristics or points that appear in the latent print and also in the inked print in the same place. (T. 124). He demonstrated for the jury that there were 18 characteristics or points of similarity between the two prints.

(T. 138-143). He was of the opinion that the latent finger-print taken from the ashtray and the ink print of the accused Thomas Lally were made by the same finger of the same hand. (T. 143).

WALTER E. PERKINS was called as a witness in behalf of the State and testified on direct examination, in part, as follows:

That he is the Director of the Crime Laboratory for the City of Hartford and had been serving in that capacity for over 9 yrs. and that prior to that time he had been assistant director of the State Bureau of Identification in charge of the firearms lab for the State Police Department for a period of 7 yrs. He testified as to his experience in performing ballistic tests with his special training and societies to which he belonged. (T. 21-23). That he had attended an autopsy on Jan. 27, 1970 upon the body of Ross Thomas. This autopsy was performed in Hartford Hospital by Doctor Tennant. (T. 24). On that same morning he received from Doctor Tennant two 32 caliber lead bullets which were taken from the body of Ross Thomas. He kept them in his possession until they were brought to court. (T. 26). He also described the gun which had been taken from Thomas Lally as a 32 caliber Columbian 5-shot-hinged-framed-revolver. (T. 32). He did certain test firings using the same type of ammunition and using the same gun and from the bullets that were recovered in the laboratory he was able to make comparisons with the bullets taken from the body of Ross Thomas by Doctor Tennant. (T. 34 and 35).

He stated as a ballistics expert that the bullets recovered from the body of Ross Thomas had been fired from the revolver which was taken from the possession of Thomas Lally. (T. 42, 43).

DOCTOR LOUIS GOLD was called by the State as a rebuttal witness and testified, in part, as follows:

That he is a medical doctor practicing the specialty of psychiatry for 40 yrs. That he was a director of psychiatry departments at McCook Hospital and at Mt. Sinai Hospital. That he is a former head of the psychiatric section of the American Academy of Forensic Sciences. He testified that he examined Thomas Lally on April 8, 1972 for about two hours. (T. 28). He found Thomas Lally suffering from two conditions: 1. An Asociopathic personality and 2. Chronic Alcoholism but that there was no evidence of mental disease. (T. 31). He said that the condition of asociopathic personality was not a defect under section 53a-13 of the General Statutes. (T. 32). And he said that Thomas Lally did not lack the capacity to understand the wrongfulness of his behavior or to conform his behavior to the requirements of the law. (T. 33).

DET. FRANCISCO A. NIRO was called as a witness for the State during the Preliminary Hearing, May 11, 1972, and testified, on cross-examination, in part, as follows:

That he kept the numbers of the photos in a separate envelope in the master file (T. 127); that he also had many more photos with him when he testified, which were used by Sgt. Murray (Tobin) and which were mixed up with his photos. (T. 128).